

STATE OF MICHIGAN
COURT OF APPEALS

DAVID ALLARD, Trustee, on behalf of KEITH
VALINSKI and NANCY VALINSKI,

UNPUBLISHED
April 14, 2009

Plaintiff-Appellant,

v

DETROIT EDISON and DTE ENERGY
COMPANY,

No. 281061
Wayne Circuit Court
LC No. 01-134584-NI

Defendants-Appellees.

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, plaintiff has presented facts sufficient to create a jury question with respect to whether defendant Detroit Edison's supervisory personnel possessed actual knowledge that an injury certainly would occur, but willfully disregarded that knowledge.

The circuit court granted Detroit Edison summary disposition pursuant to MCR 2.116(C)(10), a ruling that this Court reviews de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may grant summary disposition under subrule (C)(10) if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. *West, supra* at 183. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

The intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act, provides in pertinent part,

An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer

had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. . . . [MCL 418.131(1).]

In construing this language, we must “ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute.” *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). If the statutory language is unambiguous, this Court must presume that the Legislature intended the meaning expressed. *Id.* “Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory.” *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002). We may construe undefined terms by consulting dictionary definitions. *Id.* Whether the facts alleged by a plaintiff amount to an intentional tort “is a question of law for the trial court, while the issue whether the facts are as [the] plaintiff alleges is a jury question.” *Gray v Morley (After Remand)*, 460 Mich 738, 743; 596 NW2d 922 (1999).

This case presents two legal questions for this Court’s review: whether record evidence supports that (1) Keith Valinski’s injury occurred “as a result of a deliberate act of [his] employer,” and (2) Valinski’s employer “had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.” MCL 418.131(1). In my view, proper application of the correct standard of review and the rules of statutory construction require this Court to answer each question affirmatively and to reverse the circuit court’s grant of summary disposition.

I. Employer’s Deliberate Act

In October 1998, Detroit Edison temporarily transferred Valinski, an experienced journeyman electrician, to the Fermi II nuclear power plant. At the time, Fermi II was undergoing a scheduled “outage,” or plant-wide shut down, for maintenance. Detroit Edison ordered Valinski and his coworker, Mike O’Dell, to perform routine maintenance on components of a motor control center. A written “work package” defined the maintenance tasks assigned to Valinski and O’Dell. Kenneth Precord, a Detroit Edison supervisor, testified at his deposition that the work package outlining the activities assigned to Valinski and O’Dell on the day of Valinski’s accident specifically contemplated that the electricians would have “no protection” while they performed their work. Precord explained that a “no protection package” meant that 480 volts of electrical current would remain flowing to the motor control center in which Valinski and O’Dell performed maintenance tasks. Precord identified Steve Beckner, a “planner” in Detroit Edison’s electrical maintenance department, as the author of the work order. Precord answered affirmatively at his deposition when asked, “The operating authority intended, in fact required that there be power supplied to the motor control center while this preventative maintenance was going on?” The multiple depositions taken in this case reveal that neither O’Dell nor any Detroit Edison supervisory personnel informed Valinski that the motor control center would remain energized during the work. To the contrary, photographs in the record reflect that the motor control center where Valinski’s accident took place bore a tag reading “normally de-energized,” and Valinski testified in his deposition that he thus had performed the assigned maintenance under the presumption that the motor control center did not carry electrical power.

When viewed in the light most favorable to plaintiff, these facts establish a deliberate act by Detroit Edison. Specifically, Detroit Edison deliberately placed Valinski in small, confined

work area in which high voltage current flowed through the controls surrounding him. Furthermore, Detroit Edison supplied Valinski with noninsulated tools with which to perform the assigned maintenance. These deliberate actions of Detroit Edison satisfy the first clause of the statutory definition of an intentional tort under MCL 418.131(1).

II. Detroit Edison's Specific Intent to Injure

Plaintiff avers that when Detroit Edison deliberately maintained power to the motor control center, it knew that an injury would certainly occur, yet willfully disregarded that knowledge. The second sentence of MCL 418.131(1) explains, "An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."

The rules of statutory construction elucidated by our Supreme Court in *Robinson v Detroit*, 462 Mich 439, 459-460; 613 NW2d 307 (2000), require this Court to pay particular attention to each word and phrase selected by the Legislature. In drafting MCL 418.131(1), the Legislature created tort liability when an employer intended "an" injury, rather than the specific injury that befell the plaintiff. In *Robinson*, our Supreme Court offered the following relevant guidance:

Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between "the" and "a." "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . ." *Random House Webster's College Dictionary*, p 1382. Further, we must follow these distinctions between "a" and "the" as the Legislature has directed that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language MCL 8.3a. . . . Moreover, there is no indication that the words "the" and "a" in common usage meant something different at the time this statute was enacted [*Robinson, supra* at 461-462 (internal quotation omitted).]

We also may take guidance from dictionary definition of the term "certain." *Koontz, supra* at 312. According to *Webster's New World Dictionary*, 2d ed, p 233, the word "certain" means "sure (to happen, etc); inevitable," and "not to be doubted; unquestionable."

In my view, the record evidence gives rise to a reasonable inference that Detroit Edison, a sophisticated electric company, knew that its "no protection" work order would certainly lead to an injury. That injury was certain is evidenced by the findings of the Michigan Department of Labor (MDL), which investigated the causes of Valinski's accident. The MDL concluded that Detroit Edison's decision to maintain full electrical power while Valinski and O'Dell performed their assigned tasks constituted multiple serious violations of regulations promulgated pursuant to Michigan's Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.* The MDL report describing Valinski's injury summarized in relevant part,

. . . [E]mployees work in electrical panels on exposed energized parts and near exposed energized parts using tools that are not insulated for the type of work

they are being used. Employees use files with no handle and of a steel material in close proximity to fuse connections and switches, and also use screwdrivers with steel shafts exposed and vice grip pliers with exposed metal handles in the same situations. *Employees also work on these areas using no means to secure the power switch in the off position to prevent contact between live parts and other parts.* (Emphasis added). This resulted in an employee using an uninsulated screwdriver to pry at a circuit fuse connection *that he thought was not powered*, contacting a grounded surface, and connection with that surface resulting in an explosion and severe burns. (Emphasis in original)

* * *

Employees have several tasks dictated by a written work order that include checking the condition of fuse clips inside the panel. Employees commonly clean contacts and bend damaged fuse clips back into place. Employees were on this specific occasion expected to remove a knockout or grooved section of the ringed frame around the switch. *This required the use of heavy tools such as a file and vice grips, which were not insulated, to be used in very close proximity to the exposed live parts in the panel.* (Emphasis added). The tools would also be manipulated in extremely close proximity to the switch, which presents the opportunity for jarring the switch into the on position. . . .

These conclusions at least reasonably tend to establish that Detroit Edison knew it had deliberately placed Valinski in an extraordinarily dangerous environment, in which any contact between an uninsulated tool and a portion of the energized motor control center would unquestionably cause injury.¹ Detroit Edison nonetheless instructed Valinski to use the uninsulated tools to maintain the live equipment—precisely the task in which Valinski engaged when he flicked the piece of string from the fuse clip.

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173 (opinion by Boyle, J.), 191 (opinion by Riley, J., concurring in part and dissenting in part); 551 NW2d 132 (1996), our Supreme Court interpreted the second sentence of MCL 418.131(1) “as a legislative recognition of a limited class of cases in which liability is possible despite the absence of a classic intentional tort and as a means of inferring an employer’s intent to injure from the surrounding circumstances in those cases.” The second sentence permits an injured worker to prove intent with circumstantial evidence. *Id.* The Supreme Court specifically approved one variety of circumstantial evidence satisfying the “certainty” requirement contained in MCL 418.131(1), known as the “continually operative dangerous condition”:

¹ That contact between ungrounded metal and flowing electrical current certainly would cause injury is simply indisputable. Detroit Edison’s website summarizes this physical reality as follows: “Toaster jammed? Hedge trimmer stuck? Always unplug an appliance or tool before cleaning, adjusting or repairing it.” DTE Energy, *Electrical Safety*, <<http://my.dteenergy.com/home/safety/electricalSafety.html>> (accessed April 7, 2009).

When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur. [*Id.* at 178.]

A companion case of *Travis, Golec v Metal Exch Corp*, supplied the facts invoked by the Supreme Court when it determined that a “continually operative dangerous condition” may give rise to circumstantial evidence of intentional tort liability. *Travis, supra* at 183-187, 189-191 (opinion by Boyle, J.), 198-199 (opinion by Levin, J., concurring in part and dissenting in part). In *Golec*, the defendant employer required the plaintiff to use a front-end loader to load wet scrap containing aerosol containers into a furnace. The front-end loader lacked a protective shield. *Id.* at 157-158. The plaintiff alleged that the defendant knew that wet scrap and aerosolized cans presented an explosion hazard. *Id.* at 158. At one point during his shift, the plaintiff sustained a small burn caused by a minor explosion of the scrap. *Id.* The plaintiff’s shift leader notified his supervisor of the injury, and the supervisor instructed the plaintiff to return to work. *Id.* at 158-159. Subsequently, a huge explosion resulted in plaintiff suffering severe burns. *Id.* at 159.

The Supreme Court determined that the facts alleged by the plaintiff in *Golec* created a material question of fact regarding whether the defendant committed an intentional tort. *Travis, supra* at 184-185 (opinion by Boyle, J.), 198-199 (opinion by Levin J., concurring in part and dissenting in part). Concerning the injury’s certainty to occur, the Supreme Court explained that the absence of an earlier large explosion, or additional smaller explosions, did not eliminate the certainty that an injury would occur, reasoning as follows:

Plaintiff does not contend that every load of scrap would have exploded, but that every load of scrap had the potential to explode because each load could have contained a closed aerosol can or water. If the facts as alleged by plaintiff are established at trial, then plaintiff has proved the existence of a continually operative dangerous condition. Accordingly, we conclude that a genuine issue of material fact is presented regarding whether the injury was certain to occur. [*Id.* at 186.]

The Supreme Court also determined that sufficient facts supported that the defendant employer willfully disregarded that an injury was certain to occur, citing the supervisor’s instruction to return to work “in the face of a condition that had already led to one, albeit minor, explosion.” *Id.* at 187.

In my view, the facts alleged by plaintiff and supported in the record constitute evidence from which a reasonable jury could conclude that Detroit Edison knew that an injury was certain to occur, but willfully disregarded this knowledge. As with the dangerous work environment in *Golec*, every encounter between an electrician and the energized surfaces of the motor control center at issue here inherently embodied the potential for an electrical explosion, particularly in light of Detroit Edison’s provision of uninsulated tools. As a company in the business of generating and selling electricity, Detroit Edison indisputably knew that when an ungrounded metal tool held by a worker contacted an energized metal component, the worker would sustain injury. “[E]lectrical utility companies possess expertise in dealing with electrical phenomena

and delivering electricity.” *Schultz v Consumers Power Co*, 443 Mich 445, 451; 506 NW2d 175 (1993). Given these working conditions prescribed by Detroit Edison’s work order, a serious electrical injury was inevitable and Detroit Edison willfully disregarded the inevitability of an injury, thus satisfying the “certainty” requirement of MCL 418.131(1). I would reverse the circuit court’s grant of summary disposition and remand for trial on the merits of plaintiff’s intentional tort claim.

/s/ Elizabeth L. Gleicher